

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Bruce D. Childs and
and Brenda A. Childs,

Debtors.

NOTICE AND MOTION
OBJECTING TO CLAIM
BKY 04-30983

TO:EMC MORTGAGE CORPORATION and other parties in interest.

1. Bruce and Brenda Childs, Debtors in the above Chapter 13 case, through their attorney, move the Court for the relief requested below and give notice of hearing.

2. The Court will hold a hearing on this motion at 10:00 a.m., October 20, 2004 in Courtroom 228A, United States Courthouse, St. Paul, Minnesota.

3. Any response to this motion must be filed and delivered no later than October 19, 2004, which is 24 hours before the hearing, or filed and served by mail no later than October 17, 2004, which is three days before the hearing. UNLESS A REPLY OPPOSING THE OBJECTION IS TIMELY FILED, THE COURT MAY SUSTAIN THE OBJECTION WITHOUT THE HEARING.

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §157 and §1334, Federal Rule of Bankruptcy Procedure 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The petition commencing this case was filed on February 23, 2004. This case is now pending in this Court.

5. This objection arises under 11 U.S.C. 502, Bankruptcy Rules 3007 and 9014, and Local Rules 3007-1, 9006-1, 9013-1 through 9013-5, and such other Local Rules as may pertain. Debtors object to the claim filed by EMC Mortgage Corporation in the amount of \$15,099.17 for prepetition mortgage arrears, as more fully set forth below.

6. On December 24, 1997, Debtors obtained a loan for \$44,250 from Centex Home Equity Corporation secured by a mortgage on their homestead. The mortgage loan was subsequently assigned to Fairbanks Capital Corporation (hereinafter Fairbanks) and then to EMC Mortgage Corporation (hereinafter EMC), the current assignee.

7. On September 7, 1999, Debtors filed a Chapter 13 case in St. Paul, Minnesota, BKY 99-34491. At the time of the filing, Debtors were in arrears on the mortgage loan held by Fairbanks. Fairbanks subsequently filed a proof of claim for prepetition mortgage arrears in the amount of \$13,796.67.

8. Debtors did not object to the claim of Fairbanks for \$13,796.67. Beginning October 6, 1999 through March 31, 2003, Debtors paid a total of \$17,225.00 to the Chapter 13 trustee.. From these funds, the Chapter 13 Trustee paid Fairbanks a total of \$12,489.68 of its claim for \$13,796.67, as more fully described in the attached Exhibit A, leaving an unpaid claim balance of \$1306.99.

9. Debtors resumed their postpetition mortgage payments to EMC beginning October, 1999. In July, 2003, Fairbanks assigned its mortgage loan to EMC Mortgage Corporation (hereinafter EMC).

10. In November, 2002, EMC requested relief from the automatic stay because of postpetition payment default for the months of July, August, September, October, and November, 2002. Debtors responded to the motion by proposing a cure of \$2582.20 over a term of 11 months, by an initial payment of \$560.00 and eleven monthly payments of \$183.84, plus the regular monthly mortgage payment of \$357.83, for a total of \$541.67 per month beginning December 15, 2003. By order dated November 25, 2002, the Court approved the cure proposal; see Exhibit B. .

11 Commencing December 2, 2002, Debtors actually paid EMC as follows:

December 19, 2002	\$ 560.00
January 16, 2003	560.00
February 14, 2003	560.00

March 14, 2003	560.00
April 23, 2003	560.00
May 22, 2003	560.00
July 3, 2003	560.00
August 29, 2003	560.00
September 26, 2003	<u>350.00</u>
Total paid:	\$4830.00

12. Debtors converted their Chapter 13 case to a Chapter 7 bankruptcy on June 12, 2003. Debtors received their discharge on September 30, 2003.

13. Because Debtors were no longer in a Chapter 13 proceeding and were still in default, EMC initiated foreclosure.

14. On February 23, 2004, Debtors filed the present Chapter case. EMC was included as a creditor for prepetition mortgage arrears owed on Debtors' homestead. EMC filed a proof of claim dated March 18, 2004 for prepetition arrears in the amount of \$15,099.17. There was no appearance at the meeting of creditors by EMC. An objection to confirmation has been filed by EMC.

15. Debtors believe that as of the date of their filing of the instant Chapter 13 case, Debtors were in arrears on their mortgage with EMC as follows:

Property taxes paid by EMC	\$2604.59
Balance of prepetition arrears	
owed from prior Chapter 13 case	1310.00
Payments owed from cure order	1128.37
Payments due for November, 2003	
through February, 2004	1431.32
Accrued late charges	<u>83.15</u>
Total	\$6557.43

16. Debtors believe that the claim dated March 18, 2004 filed by EMC Mortgage does not take into account the \$4830.00 paid by the Debtors beginning December, 2002.

17. Pursuant to 11 U.S.C. §502(a), a claim is deemed allowed upon the filing of a

proof of claim unless a party in interest objects. Unless disallowed, the Chapter 13 Trustee will pay the claim in full as filed.

18. Unless disallowed, EMC will receive from the Trustee more than it is entitled to, thus depriving priority and unsecured creditors timely payment of their claims.

19. Debtors, through their attorney, have contacted EMC and requested verification of their payments. Debtors have not received any response from EMC.

20. If testimony is required, the Debtors will testify as to the matters set forth in this objection.

21. Because Debtors believe that EMC will correct its claim upon review of its payment records, and because this objection to claim does not involve a novel question of law, no memorandum accompanies this motion objecting to claim, as permitted by Local Rule 9013-5.

WHEREFORE, Debtors move the court for an order allowing the claim of EMC Mortgage only to the extent of \$6557.43, and for such other relief as is just and equitable.

/s/ Ian Traquair Ball

Ian Traquair Ball #4285

Attorney for Debtors

12 South Sixth Street, #326

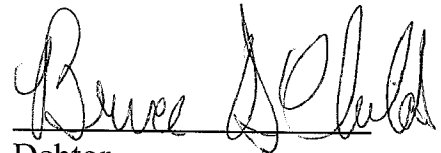
Minneapolis, MN 55402

Tel: (612) 338-1313

Dated: August 27, 2004

VERIFICATION

Bruce Childs, Debtor, states that he has read the foregoing Motion and that the facts stated therein are true and correct to the best of his knowledge and belief.


Debtor
8/27/04

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Bruce D. Childs and
Brenda A. Childs,
Debtors.

ORDER
BKY 04-30983

At St. Paul, Minnesota.

This matter came on for hearing before this Court on the objection of debtors to the claim of EMC Mortgage Corporation. Appearances are as noted in the record.

Based upon the arguments of counsel, the files and record herein, IT IS ORDERED AND
ADJUDGED:

That the claim of EMC Mortgage Corporation for prepetition mortgage arrears is allowed to the extent of \$6557.43.

United States Bankruptcy Judge

Dated:

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

BRUCE D. CHILDS
BRENDA ANN CHILDS,

Debtor(s).

**CERTIFICATE OF
SERVICE**

BKY 04-30983

I, Phyllis Roden, declare under penalty of perjury that on August 30, 2004, I mailed copies of the foregoing Notice and Motion Objecting to Claim to each entity named below at the stated addresses.

Jasmine Z. Keller
Chapter 13 Trustee
310 Plymouth Building
12 South 6th Street
Minneapolis MN 55402

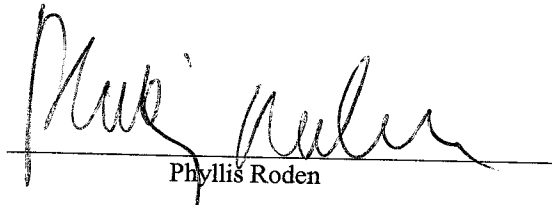
United States Trustee
1015 US Courthouse
300 South 4th Street
Minneapolis MN 55415

Mr. and Mrs. Bruce D. Childs
PO Box 6
Elysian, MN 56028

James A. Geske, Esq.
7650 Currell Boulevard #300
Woodbury, MN 55125

EMC Mortgage Corporation
PO Box 225749
Irving, TX 75014-1358

Dated: August 30, 2004



Phyllis Roden